Supreme Court, U.S.
FILED

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No. _____

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In The

Supreme Court of the United States

October Term, 1993

COMMERCIAL LIFE INSURANCE COMPANY,

Petitioner,

v.

LONNIE TOLLEY,

Respondent.

COMMERCIAL LIFE INSURANCE COMPANY,

Petitioner,

v.

ALLEN SHELTON,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

SUPPLEMENTAL APPENDIX

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14 pp

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

LONNIE R. TOLLEY	)	
	)	
v.	)	NO. CIV-2-92-42
COMMERCIAL LIFE	)	
INSURANCE COMPANY	)	

ORDER

(Filed Oct. 27, 1992)

This is an action under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(a)(1)(B), to recover a $250,000.00 lump sum payment for permanent total disability under a Voluntary Accidental Death & Dismemberment Insurance Policy. Plaintiff Lonnie R. Tolley was chemical operator with Nuclear Fuel Services, Inc. of Erwin, Tennessee, when he injured his back in a work-related accident on February 28, 1989.

On that date, Mr. Tolley and another worker were on top of a building using ropes to lift a 400 lb. pan for heat exchanger. Apparently the rope slipped, both men tried to catch it, and Mr. Tolley experienced a pull in the right side of his back in the upper lumbar area. An accident report was filed but, at the time, Mr. Tolley thought he was not seriously injured. Pain developed in the night. The company doctor, N. E. Hyder, examined him the next day and referred him to an orthopaedic surgeon. Mr. Tolley was seen by Dr. Calvin Johnson of Watauga Orthopaedics who first diagnosed him as suffering from acute lumbar strain. Mr. Tolley returned to work under lifting

restrictions but his condition did not improve. By May, he was unable to work at all. An annular bulge was found on his right side at L5-S1. By August, it was necessary for him to undergo a percutaneous discectomy. He continued to experience significant pain after his surgery and eventually qualified for worker's compensation, long-term disability benefits, and Social Security disability insurance benefits. At issue in this case, of course, is whether or not he also qualifies for benefits under the accidental disability insurance offered by defendant Commercial Life Insurance Company. The case is now before the Court on cross-motion for summary judgment.

Commercial Life first argues that Mr. Tolley did not suffer an "accident" within the meaning of the policy and relevant state insurance law. Rather, he and another man voluntarily undertook to lift a metal apparatus which weighed over 400 pounds – an unreasonable undertaking for almost any two men but intentional, not accidental.

In next contends that, under the terms of the plan, the accident in question must be the "sole" cause of the disability and that no other pre-existing disability, disease, or bodily infirmity can have contributed to causing the disability for which the benefit is sought. In this case there is evidence that Mr. Tolley had a pre-existing back condition (a "bodily infirmity") which contributed to his disability. There is evidence that he injured his back at work in September of 1982; again in 1984; that he was suffering back pain in 1985; and again in 1986. In addition, he was involved in an automobile accident in 1986, after which he sued for aggravation of a back condition.

Page 8 of the Voluntary Accident Insurance Plan provides, in pertinent part,

> The company hereby certifies that the employee . . . [is] issued under the subject to the terms, conditions and limits of the policy . . . against loss resulting **directly and independently of all other causes** from bodily injuries caused by accident occurring while this policy is in force . . . (emphasis added).

One of the "conditions and limits" referred to above appears on page 10. It reads,

> This policy does not cover loss caused by or resulting from any one or more of the following: . . . D. Illness, disease, pregnancy, childbirth, miscarriage, **bodily infirmity** or any bacterial infection other than bacterial infection occurring in consequence of an accidental cut or wound. (emphasis added.)

Finally, Commercial Life argues that Mr. Tolley is not totally disabled within the terms of the policy. Permanent, total disability, as defined on page 10 of the policy,

> means the Insured's complete inability, because of such injuries, to perform every duty pertaining to his/her usual occupation for a continuous period of twelve months and thereafter, without interruption, his/her complete inability, because of such injuries, to engage in any occupation or employment for which he/she is fitted by reason of education, training or experience.

Commercial Life points out that Mr. Tolley's back surgeon, Dr. Calvin J. Johnson, rated him as suffering from a 23% permanent impairment to the body as a whole based

on the *AMA Guides to the Evaluation of Permanent Impairment*, in a letter of July 30, 1990. Moreover, Mr. Tolley settled his claim for worker's compensation, agreeing that he was only 55% disabled. Dr. Alex Williams, an orthopaedic surgeon who examined Mr. Tolley for the defendant, assigned him only a 10% permanent impairment to his body as a whole. However, the Court notes that vocational expert Norman E. Hankins found him 100% disabled, "from a practical standpoint" and that he was found qualified for disability insurance benefits under Social Security law.

Much of the defendant's brief is directed to its insistence that this Court should incorporate into federal ERISA law the traditional definitions of disability insurance terms developed in the state's common law of insurance. It calls the Court's attention to many Tennessee cases which draw a distinction between "accidental cause" and "accidental means." An injury is not produced by "accidental means" when it is the natural result of an act in which the insured intentionally engages, such as Mr. Tolley's intentionally exposing himself to almost certain injury in attempting to lift the pan to the heat exchanger.

As the Court understands ERISA law, it is to give a *de novo* review of the administrator's decision based upon the record before him. *Perry v. Simplicity Engineering*, 900 F.2d 963 (6th Cir. 1990). Moreover, it is up to the courts to fashion a uniform federal common law using commonsense cannons of contract interpretation, rather than incorporating any state's common law of insurance. *Wickman v. Northwestern National Insurance Company*, 908 F.2d 1077, 1084. (1st Cir. 1990). However, in the instant case,

there is no need to determine whether Mr. Tolley's injury was caused by "accidental means" or whether or not he is totally disabled within the meaning of the policy. It is clear from the evidence in the record that his disability was caused, at least in part, by his pre-existing back condition which is certainly a "bodily infirmity." Under the plain language of the policy, his injury of February 1989, was not caused "directly and independently of all other causes" by his lifting of the heavy object.

Based upon its review of the entire record before the plan administrator, the Court is satisfied that Commercial Life's motion for summary judgment is well taken and should be granted.

Accordingly, judgment is hereby **ENTERED** in favor of the defendant and the plaintiff will take nothing on his claim.

ENTER:

/s/ Thomas G. Hull
THOMAS G. HULL
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

ALLEN SHELTON	)	
	)	
v.	)	NO. CIV-2-90-88
COMMERCIAL LIFE	)	
INSURANCE COMPANY	)	

ORDER

(Filed Oct. 30, 1992)

This is an action under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(a)(1)(B), to recover a $250,000.00 lump sum payment for permanent total disability under a Voluntary Accident Insurance Plan for Hourly Employees of Nuclear Fuel Service, Inc. Plaintiff Allen Shelton was a material handler with Nuclear Fuel Services, Inc. of Erwin, Tennessee, when he injured his back in a work-related incident on September 13, 1988.

FINDINGS OF FACT

The undisputed operative facts as set out by the plaintiff in his brief in support of motion for summary judgment are as follows:

> Allen Shelton was a chemical operator at Nuclear Fuels Services, Inc. in Erwin, Tennessee from 1976 until September 1989. Nuclear Fuel is a manufacturer of nuclear fuel provided to the United States Navy for use on nuclear submarines. Mr. Shelton's job description consisted of

charging furnaces and dissolvers as well as handling powders and materials in the manufacturing process.

On November 4, 1977, Mr. Shelton had an accident to his back that required him to have surgery for a ruptured disc. He subsequently returned to his job with certain restrictions but otherwise doing a full range of normal activities. The company doctor, on the other hand, returned him to work without any restrictions. He continued to work at Nuclear Fuel until January 19, 1987, when he further injured his back in a car wreck. He received conservative treatment until February 23, 1987, at which time he was given a physical and released to go back to his work without any restrictions.

Mr. Shelton's final injury occurred on September 13, 1988. While lifting a 60 to 70 pound tube he experienced low back pain that radiated into his left hip and leg. He was treated conservatively by Dr. William Kennedy, a local orthopedic surgeon, until December 5, 1988. On that date Mr. Shelton underwent a multiple level discography confirming his back injury and then underwent a total disc replacement at the L-5 level. Following his surgery Mr. Shelton never returned to his former employment or to any other subsequent employment. Dr. Norman Hankins, a vocational expert, confirmed his impairments, condition, and restrictions along with his treating and independent physicians.

In addition, Dr. William E. Kennedy, plaintiff's treating orthopedic surgeon, in regard to the September 1988 injury, testified in a deposition on September 5, 1989, which is a part of this record, as follows:

Q Okay. So he was in there about eleven days?

A Well, I saw him December 2nd. I think he had been admitted several days before I saw him.

Q All right. Go ahead.

A After he did not respond satisfactorily to the combination of the rest and the epidural steroid injection, I took him to surgery on December 5, 1988, and carried out multiple level diskography [sic] under local anesthesia with anesthiology stand by. That is a test in which we place small needles into the three lower discs of the lumbar spine and inject contrast material into them, both to get another prospective of the anatomy of the disc, and to see whether or not we can reproduce the patient's pain by increasing the pressure transient on the inside of the disc. In his case, we were able to reproduce this pain with the injection at the L-5 level, but the L-4 level was normal and did not reproduce the patient's pain. I gave him another therapeutic trial with steroid preparation by injecting Depo-Medrol into the L-5 disc, but unfortunately he received no benefit from the Depo-Medrol injection. it was my conclusion at that point that he was suffering from painful degenerative disc disease at the fifth lumbar level, and therefore after appropriate discussion with the patient concerning the limited goals of the surgery, the indications for surgery, along with the possible complications and the guarded prognosis, we took him to surgery on December 9th, and carried out a total disc replacement of the painful disc at L-5. We replaced it with bone grafts and we internally fixed the L-5 vertebral body to the first sacral body, using VSP spine plating. The

surgery included extensive decompression and excision of scar.

Q You basically did surgery on the same level that Dr. Chapman had done before?

A Yes.

Q And would you explain to the Court what you did differently than what Dr. Chapman had done, and why what you did was necessary treatment?

A Dr. Chapman had removed the bulging portion of the disc that was extending into the spinal canal and that part of the disc that was immediately behind the bulge, and had depended on healing inside the disc space for a long term benefit of the pain, for reduction of pain. Obviously that healing had taken place and to good quality, because the patient had achieved considerable relief of the pain, which lasted for a number of years, from 1976, approximately, until 1988. But we know that the healing of a disc following a disc injury such as he had in 1976, which requires surgery, is not of the same strength as a normal uninjured disc, and therefore it is my belief, with reasonable medical probability, that the L5 disc was left in a weakened condition and vulnerable for the type of injury that he described had taken place at Nuclear Fuels in September, 1988. And we have found that once a disc is re-injured like that, that it is better to actually replace that disc with bone and try to get the vertebral body above that disc space to fuse solidly to the vertebral body below it in order to really strengthen that segment, and that's what we did in his case. We went in and simply replaced the total disc with a bone plug, bone blocks, and then fixed the two vertebral

bodies together using internal fixation, specially designed plates and screws. (Deposition, pp. 11-13).

CONCLUSIONS OF LAW

Mr. Shelton never returned to work after his injury in September of 1988, and eventually qualified for worker's compensation and long-term disability benefits. At issue in this case in whether or not he also qualifies for benefits under the accidental disability insurance coverage afforded by defendant Commercial Life Insurance Company. The case is now before the Court on cross-motions for summary judgment.

Commercial Life first argues that Mr. Shelton did not suffer an "accident" within the meaning of the policy and relevant state insurance law. Rather, the defendant contends that the plaintiff allegedly injured his back while voluntarily moving work material in his customary and ordinary manner.

Secondly, Commercial Life points out that Mr. Shelton's back surgeon, Dr. Kennedy, rated him as suffering from a 27% permanent impairment to the body as a whole based on the *AMA Guides to the Evaluation of Permanent Impairment*, in his deposition taken in September of 1989. Moreover, Mr. Shelton settled his claim for worker's compensation in September of 1989, agreeing that he was 45% disabled. However, the Court notes that Dr. Norman E. Hankins, a vocational expert, found that the plaintiff was "under a vocational disability of 100%."

Finally, the defendant contends that, under the terms of the plan, the accident in question must be the "sole"

cause of the disability and that no other pre-existing disability, disease, or bodily infirmity can have contributed to causing the disability for which the benefit is sought. In this case, there is evidence that Mr. Shelton had a pre-existing back condition (a "bodily infirmity") which contributed to his disability.

Page 8 of the Voluntary Accident Insurance Plan provides, in pertinent part,

> The company hereby certifies that the employee . . . [is] insured under and subject to the terms, conditions and limits of the policy . . . against loss resulting **directly and independently of all other causes** from bodily injuries caused by accident occurring while this policy is in force . . . (emphasis added).

One of the "conditions and limits" referred to above appears on page 10. It reads,

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Permanent, total disability, as defined on page 10 of the policy,

> means the Insured's complete inability, because of such injuries, to perform every duty pertaining to his/her usual occupation for a continuous period of twelve months and thereafter, without interruption, his/her complete inability, because of such injuries, to engage in any occupation or

> employment for which he/she is fitted by reason of education, training or experience.

Under applicable ERISA law, this Court must review the administrator's decision *de novo* based upon the record before him. *Perry v. Simplicity Engineering*, 900 F.2d 963 (6th Cir. 1990). Moreover, it is up to the courts to fashion a uniform federal common law using common-sense cannons of contract interpretation, rather than incorporating any state's common law of insurance. *Wickman v. Northwestern National Insurance Company*, 908 F.2d 1077, 1084. (1st Cir. 1990). However, in the instant case, there is no need to determine whether Mr. Shelton's injury was caused by "accidental means" or whether or not he is totally disabled within the meaning of the policy. It is apparent from the totality of the evidence in the record that his disability was caused, at least in part, by his pre-existing back condition which is certainly a "bodily infirmity." Under the plain language of the policy, his injury of September 1988, was not caused "directly and independently of all other causes" by his lifting of the heavy object.

Based upon its review of the entire record before the plan administrator, the Court is satisfied that Commercial Life's motion for summary judgment is well taken and should be granted.

Accordingly, the defendant's motion for summary judgment is **GRANTED**; the plaintiff's motion for summary judgment is **DENIED**; the plaintiff's complaint is

DISMISSED; and judgment is hereby **ENTERED** in favor of the defendant.

ENTER:

/s/ Thomas G. Hull
THOMAS G. HULL
UNITED STATES
DISTRICT JUDGE